Thayanantha Rao a/l Bala Krishna v Sjn Muhammad Izwan bin Izham & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-21NCVC-43–07 OF 2020
MOHD JOHAN LEE J
21 MAY 2024

Tort — Damages — False/unlawful arrest and detention — Identity exploited by criminal — Whether there was a negligence and breach of statutory duties in performance of police function — Whether there was wrongful arrest and detention — Whether there mistaken identity should be investigated — Whether there was abuse of process — Whether there was a diary of investigation made — Whether police bail was unlawful — Whether there was misfeasance in public office — Federal Constitution art 5(4) — Criminal Procedure Code ss 28, 29, 117, 119, 388 — Police Act 1967 s 32

In the present action, the plaintiff whose identity was exploited by a criminal claimed for declaration and damages for the tort of unlawful arrest and detention. On 20 December 2017, the plaintiff was riding his motorcycle around Jalan Imbi, Kuala Lumpur and was stopped by a police officer and was asked to produce his national registration identity card ('IC'). The plaintiff complied with the request. Upon obtaining the IC, the police officer proceeded to conduct a search in the police database ('the PDRM Database'). Shortly thereafter, the plaintiff was informed that the result of the search showed that the plaintiff was wanted by the police for an offence under the Dangerous Drugs Act 1952 ('the DDA 1952'). Immediately, the plaintiff was arrested and taken to IPD Brickfields at Sri Petaling for further investigation ('first arrest and detention'). The plaintiff was then informed by a police officer that he would be immediately released without charge and/or further investigation as the police had found out that even though the PDRM Database did identify the plaintiff's IC as being the person wanted by the police, the wanted person who had purportedly misused his IC was one Mohd Shukri Rao bin Abdullah ('Shukri Rao'). A year and half later, on 10 May 2019, the second defendant together with other police officers approached the plaintiff and asked him to provide his IC. The second defendant then conducted a criminal record search on the plaintiff and was told him that the PDRM Database showed that the plaintiff had committed several serious crimes and that the plaintiff was wanted by the police for an offence under the DDA 1952. The plaintiff attempted to explain to the second defendant that this was a case of mistaken identity and that he had all the details in his mobile phone. However, this was ignored by the second defendant who then arrested the plaintiff and the latter was brought to IPD Dang Wangi ('the second arrest and detention). The second day, 11 May

2019, the Magistrate, upon such application by the first defendant, granted the remand order for 3 days until 13 May 2019 ('remand order'). On 13 May 2019, the first defendant informed the plaintiff that he would be released on police bail later the same day. On the day following his release on police bail, the plaintiff conducted a search at the National Registration Department ('JPN Search') on his own IC number and found out that no other person bore the same IC number beside himself. Deprived by the situation, the plaintiff filed this suit.

Held, allowing the claim:

(1) The court found that the first defendant's failure to carry out the most basic and typical investigative practice to check or at least verify the suspect's identity, tantamount to a sheer negligence and breach of statutory duties in the performance of a police function. In other words, following the plaintiff's first arrest and detention and the later finding and release of the plaintiff, the first defendant had failed to take reasonable steps to change or amend the PDRM Database to ensure that the plaintiff's name was no longer in the system. The court was of the view that the first defendant had, by omission, negligently left the plaintiff's name and IC on the PDRM Database when the first defendant knew very well that the plaintiff was not Shukri Rao and the plaintiff was not in any way connected to the offences purportedly carried out by Shukri Rao (see paras 34–35).

(2) The first defendant did not immediately investigate the matter, nor did he investigate the truth of the information given by the plaintiff and SP3 concerning mistake identity. The first defendant testified during trial that he did not investigate whether the correct suspect was arrested. The first defendant did nothing on the investigation. It was unreasonable and flies against the entire purpose and object of s 28(2) of the CPC. It was also preposterous for the first defendant to claim that they could not investigate during weekend, or they could not get their hands on the IP during weekends. After all, the price of an individual's liberty and freedom was at stake (see paras 61 & 64).

(3) According to s 117 of the CPC, before any remand application is made, an investigation must be conducted within the initial 24 hours. The police must record in the investigation diary the investigations carried out within this 24-hour period before a remand application could be approved. However, in this case, the second defendant admitted to not conducting any investigation within the initial 24 hours and subsequently made a remand application 'to seek an extension of time for further investigation' of the plaintiff. This constituted an obvious case of abuse of process (see paras 81–82).

(4) The mere reason of 'for further investigation' was not sufficient to justify the remand order. It was an obvious case of a lackadaisical attitude. Unless there were good and valid grounds for the first defendant to believe that the plaintiff must be kept in police detention as he would otherwise interfere with police investigation or alternatively that he might abscond, there were simply no plausible grounds for the plaintiff to be kept in the police lockup for three days and for a remand order and more so for a 'waran menahan' to be taken and issued against the plaintiff. Further, s 29 of the CPC could have been utilised to release the suspect on police bail, with/without conditions/guarantors to make certain that the plaintiff be present in court. Yet, this was not done by the first defendant (see paras 104 & 114–115).

(5) The court observed that beside the documents showing the issue of mistaken identity, during trial, the first defendant had testified that he also went to the National Registration Department on 13 May 2019 to verify the plaintiff's fingerprints against the JPN's record where he was told by JPN that there was no record found. Hence, there was no rationale for releasing the plaintiff on police bail when he already knew with 100% certainty that the plaintiff was not the suspect for the Chow Kit Report. Despite knowing that the plaintiff was not involved in the Chow Kit Report and that the plaintiff had been wrongly arrested, the defendants, for unknown reasons took extraordinary and gratuitous action to release the plaintiff on bail which continued until this decision. The defendants could not conveniently shield their wrongdoings under the Police Act 1967. As public officers, they must be accountable for all their wrongful acts, deeds and negligence and compensate their tortious victims who had suffered losses accordingly (see paras 120, 122 & 131).

(6) The first, second and fourth defendant had full knowledge that the plaintiff was not the correct suspect in the Chow Kit Report, yet they failed to unconditionally release the plaintiff on 13 May 2019 and had released and kept the plaintiff on police bail instead for the past four years. In fact after the filing of this action and before the commencement of the trial, and after years of writing to seek action by the police to clear his good name, it was SP1 who stepped in and replied to the plaintiff's counsel in 2021 admitting and acknowledging that indeed the plaintiff's IC number had been exploited by Shukri Rao. Together with this frank disclosure, SP1 also stated in the letter that the police had since deleted the criminal record of Shukri Rao in the PDRM Database and ratified the details of numerous police reports. It was clear that the plaintiff had also established on the balance of probabilities that the tort of misfeasance in public office had also been committed by the defendants through their handling of this case which has caused the unfortunate suffering of the plaintiff (see paras 137, 139 & 141).

[Bahasa Malaysia summary

Dalam tindakan ini, plaintif yang disalahgunakan identitinya oleh penjenayah menuntut pengisytiharan dan ganti rugi atas salah laku tort penangkapan dan penahanannya yang menyalahi undang-undang. Pada 20 Disember 2017, plaintif menunggang motosikalnya di sekitar Jalan Imbi, Kuala Lumpur dan telah diarahkan untuk berhenti oleh seorang pegawai polis dan diminta untuk mengemukakan kad pengenalan pendaftaran ('KP'). Plaintif mematuhi permintaan itu. Setelah memperoleh kad pengenalannya, pegawai polis itu melakukan carian dalam pangkalan data polis ('Pangkalan Data PDRM'). Tidak lama selepas itu, plaintif dimaklumkan bahawa hasil carian menunjukkan bahawa plaintif dikehendaki oleh polis atas kesalahan di bawah Akta Dadah Berbahaya 1952 ('ADB 1952'). Serta-merta, plaintif ditangkap dan dibawa ke IPD Brickfields di Sri Petaling untuk siasatan lanjut ('penangkapan dan penahanan pertama'). Plaintif kemudiannya dimaklumkan oleh seorang pegawai polis bahawa dia akan dibebaskan serta-merta tanpa pertuduhan dan/atau siasatan lanjut kerana polis telah mendapati bahawa walaupun Pangkalan Data PDRM telah mengenal pasti kad pengenalan plaintif sebagai orang yang dikehendaki oleh polis, orang yang dikehendaki tersebut bernama Mohd Shukri Rao bin Abdullah ('Shukri Rao') dan telah menyalahgunakan kad pengenalannya. Setahun setengah kemudian, pada 10 Mei 2019, defendan kedua bersama-sama pegawai polis lain menghampiri plaintif dan memintanya untuk memberikan IC. Defendan kedua kemudian melakukan carian rekod jenayah ke atas plaintif dan diberitahu bahawa Pangkalan Data PDRM menunjukkan bahawa plaintif telah melakukan beberapa jenayah serius dan plaintif dikehendaki oleh polis atas kesalahan di bawah ADB 1952. Plaintif cuba menjelaskan kepada defendan kedua bahawa identitinya disalahgunakan dan dia mempunyai semua butiran dalam telefon bimbitnya. Walau bagaimanapun, hal ini tidak diendahkan oleh defendan kedua yang kemudiannya menangkap plaintif dan membawanya ke IPD Dang Wangi ('penangkapan dan penahanan kedua'). Pada 11 Mei 2019, Majistret, atas permohonan oleh defendan pertama, memberikan perintah reman selama 3 hari sehingga 13 Mei 2019 ('perintah reman tersebut'). Pada 13 Mei 2019, defendan pertama memaklumkan kepada plaintif bahawa dia akan dibebaskan dengan jaminan polis pada hari yang sama. Pada hari selepas dibebaskan dengan jaminan polis, plaintif melakukan carian di Jabatan Pendaftaran Negara ('carian JPN') pada nombor kad pengenalannya sendiri dan mendapati bawah tiada orang lain yang mempunyai nombor kad pengenalan yang sama selain dirinya. Terkilan dengan keadaan itu, plaintif memfailkan saman ini.

Diputuskan, membenarkan rayuan:

(1) Mahkamah mendapati terdapat kegagalan defendan pertama untuk menjalankan amalan penyiasatan yang paling asas untuk memeriksa atau sekurang-kurangnya mengesahkan identiti suspek adalah merupakan satu kecuaian dan pelanggaran tugas statutori dalam melaksanakan

fungsi polis. Dalam erti kata lain, berikutan penahanan dan penahanan pertama plaintif dan penemuan dan pembebasan plaintif kemudiannya, defendan pertama telah gagal mengambil langkah yang munasabah untuk menukar atau meminda Pangkalan Data PDRM untuk memastikan nama plaintif tidak lagi berada dalam system tersebut. Mahkamah berpendapat bahawa defendan pertama, dengan peninggalan, telah dengan cuainya tidak memadamkan nama dan kad pengenalan plaintif dalam Pangkalan Data PDRM sedangkan defendan pertama mengetahui bahawa plaintif bukanlah Shukri Rao dan plaintif tidak mempunyai kaitan dengan kesalahan yang dilakukan oleh Shukri Rao (lihat perenggan 34–35).

(2) Defendan pertama tidak segera menyiasat perkara itu dan juga tidak menyiasat kebenaran maklumat yang diberikan oleh plaintif dan SP3 mengenai kesilapan identiti plaintif. Defendan pertama memberi keterangan semasa perbicaraan bahawa dia tidak menyiasat sama ada suspek yang betul telah ditangkap. Defendan pertama tidak melakukan apa-apa pun di dalam siasatan. Ianya tidak munasabah dan bertentangan dengan keseluruhan tujuan dan objektif s 28(2) KPJ. Ianya juga tidak masuk akal bagi defendan pertama untuk mendakwa bahawa mereka tidak dapat menyiasat pada hujung minggu atau mereka tidak dapat mengakses kertas siasatan pada hujung minggu. Harga kebebasan individu telah dipertaruhkan di dalam kes ini (lihat perenggan 61 & 64).

(3) Menurut s 117 KPJ, sebelum sebarang permohonan reman dibuat, siasatan mesti dijalankan dalam tempoh 24 jam awal. Polis mesti merekodkan dalam diari siasatan siasatan yang dijalankan dalam tempoh 24 jam ini sebelum permohonan reman dapat diluluskan. Bagaimanapun, dalam kes ini, defendan kedua mengaku tidak menjalankan sebarang siasatan dalam tempoh 24 jam awal dan kemudiannya membuat permohonan reman 'untuk mendapatkan lanjutan masa untuk siasatan lanjut' terhadap plaintif. Hal ini merupakan kes penyalahgunaan proses yang jelas (lihat perenggan 81–82).

(4) Alasan 'untuk siasatan lanjut' semata-mata tidak mencukupi untuk mewajarkan perintah reman. Ini adalah kes yang jelas tentang sikap sambalewa. Melainkan terdapat alasan yang kukuh dan sah untuk defendan pertama mempercayai bahawa plaintif mesti ditahan dalam tahanan polis kerana akan mengganggu siasatan polis atau sebagai alternatif bahawa dia mungkin melarikan diri, tiada alasan yang munasabah untuk plaintif ditahan di lokap polis selama tiga hari untuk perintah reman dan lebih-lebih lagi untuk 'waran penahanan' diambil dan dikeluarkan terhadap plaintif. Selanjutnya, s 29 KPJ boleh digunakan untuk membebaskan suspek dengan jaminan polis, dengan/tanpa syarat/penjamin untuk memastikan bahawa plaintif hadir

di mahkamah. Namun, ini tidak dilakukan oleh defendan pertama (lihat perenggan 104 & 114– 115).

(5) Selain dokumen yang menunjukkan isu kesilapan identiti, Mahkamah juga meneliti semasa perbicaraan yang mana defendan pertama telah memberi keterangan bahawa dia juga telah pergi ke Jabatan Pendaftaran Negara pada 13 Mei 2019 untuk mengesahkan cap jari plaintif terhadap rekod JPN di mana dia diberitahu oleh JPN bahawa tiada rekod ditemui. Oleh itu, tiada rasional untuk membebaskan plaintif dengan ikat jamin polis sedangkan dia sudah tahu dengan 100% kepastian bahawa plaintif bukan suspek bagi Laporan Chow Kit. Walaupun mengetahui bahawa plaintif tidak terlibat dalam Laporan Chow Kit dan bahawa plaintif telah ditangkap secara salah, defendan atas sebab yang tidak diketahui mengambil tindakan luar biasa dan tidak wajar untuk membebaskan plaintif dengan ikat jamin yang berterusan sehingga keputusan kes ini. Defendan tidak dapat dilindungi di bawah Akta Polis 1967 atas salah laku tersebut. Sebagai pegawai awam, mereka mesti bertanggungjawab ke atas semua perbuatan dan kecuaian mereka yang salah dan membayar pampasan kepada mangsa yang telah mengalami kerugian dengan sewajarnya (lihat perenggan 120, 122 & 131).

(6) Defendan pertama, kedua dan keempat mempunyai pengetahuan penuh bahawa plaintif bukanlah suspek yang sebenar dalam Laporan Chow Kit, namun mereka gagal membebaskan plaintif tanpa syarat pada 13 Mei 2019 dan mengekalkan plaintif dengan jaminan polis sejak empat tahun yang lalu. Malah, selepas pemfailan tindakan ini dan sebelum bermulanya perbicaraan dan selepas bertahun-tahun menulis untuk mendapatkan tindakan daripada polis untuk membersihkan nama baiknya, SP1 yang telah membalas kepada peguam plaintif pada 2021 mengakui bahawa sememangnya nombor kad pengenalan plaintif telah disalahgunakan oleh Shukri Rao. Dengan pendedahan ini, SP1 juga menyatakan dalam surat itu bahawa polis telah memadamkan rekod jenayah Shukri Rao dalam Pangkalan Data PDRM dan meratifikasi butiran laporan polis. Adalah jelas bahawa plaintif telah membuktikan menurut keseimbangan kebarangkalian bahawa tort salah laku penjabat awam juga telah dilakukan oleh defendan melihat kepada pengendalian tugas mereka terhadap kes ini telah menyebabkan kesusahan plaintif (lihat perenggan 137, 139 & 141).]

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application [2001] 2 MLJ 689, HC (refd)

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 277, FC (refd)

Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor [2020] 7 MLJ 549, HC (refd)

Bohar Singh Khera v Secretary of State for the Home Department and another

appeal [1983] 2 WLR 321, HL (refd)
Chong Fook Kam & Anor v Shaaban & Ors [1968] 2 MLJ 50, FC (refd)
Dasthigeer B Mohamed Ismail v Kerajaan Malaysia & Anor [1999] MLJU 121; [1999] 6 CLJ 317, HC (refd)
Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116, FC (refd)
Hashim bin Saud v Yahaya bin Hasim & Anor [1977] 1 MLJ 259 (refd)
Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141, FC (folld)
Johara bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)
Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 MLJ 468 (refd)
Lee Cher Joo @ Lee Sujan & Anor v Mohd Sharif bin Othman & Ors [2009] 9 MLJ 352; [2009] 6 CLJ 165, HC (refd)
Mohd Hady bin Ya'Akop v Hassan bin Marsom & Ors [2016] 4 MLJ 141, CA (refd)
PP v Ambika a/p MA Shanmugam [2021] 2 MLJ 723, CA (refd)
PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477; [1997] 4 AMR 3584, CA (refd)
Rahaya bt Salleh (administratrix for the estate and dependant of Kamarulnizam bin Ismail, deceased) v Nik Mohd Ghazali B Nik Zul Azhar & Ors and another appeal [2022] 5 MLJ 337; [2022] 5 MLRA 280, CA (refd)
Syed Mohammad b Syed Isa, Re; Mohd Rosdi bin Jaafar; Thiagarajah a/l Palaniandy; Rajis a/l Seeni Deen & Ors [2001] MLJU 163; [2001] 3 AMR 3769, HC (folld)
Reeves v Commissioner of Police for the Metropolis [2000] 1 AC 360, HL (refd)
Saul Hamid bin Pakir Mohamad v Inspektor Abdul Fatah bin Abdul Rahman & Anor [2007] 6 MLJ 47; [2007] 5 CLJ 93, CA (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)
Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yogananthy a/p AS Thambaiya v Harta Pusaka Idris bin Osman [2020] 5 MLJ 455, FC (refd)
Zaidah bt Ismail v Inspektor Rabiatul Adawiayah bt Mohd Noor & Ors and another appeal [2021] MLJU 2109, CA (refd)

Legislation referred to

Criminal Procedure Code ss 20A(1), 23, 23(1), 28(2), (3), 28A, 29, 117, 119, 120, 173, 254
Dangerous Drugs Act 1952
Federal Constitution art 5(1), (3), (4)
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) s 73
Police Act 1967 s 32(1)

Jayananda Rao Simmachalan (with Gayathri Chandrakasan and Ho Xin Ying) (Rao & Kamal) for the plaintiff.
Syahriah Shapiee (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Mohd Johan Lee J:

INTRODUCTION

[1] This case related to unlawful arrest and detentions of an unfortunate man namely, Thayanantha Rao a/l Bala Krishna ('the plaintiff') whose identity was exploited by a criminal.

BRIEF FACTS OF THE CASE

[2] The first defendant is at all material times, an Assistant Investigating Officer ('IO') with Jabatan Siasatan Jenayah Narkotik, IPD Dang Wangi, Kuala Lumpur.

[3] The second defendant is a patrolling officer at IPD Dang Wangi, Kuala Lumpur. He was the officer who arrested the plaintiff on 10 May 2019, the date in issue.

[4] The third defendant was an IO from Bahagian Siasatan Jenayah Narkotik, IPD Dang Wangi, Kuala Lumpur as well as the inspector granting police bail to the plaintiff.

[5] The fourth and the fifth defendants were the Officers in Charge of the Police District (OCPD) at IPD Dang Wangi and IPD Brickfields respectively.

[6] The unfortunate event happened to the plaintiff in 2019. However, to understand the material facts leading to the arrest in 2019, one must know what happened in 2017 when all his nightmare began.

[7] On or about 20 December 2017, as the plaintiff was riding his motorcycle around Jalan Imbi, Kuala Lumpur, he was stopped by a police officer and was asked to produce his national registration identity card ('IC'). The plaintiff complied with the request. Upon obtaining the IC, the police officer proceeded to conduct a search in the police database ('the PDRM Database'). Shortly thereafter, the plaintiff was informed that the result of the search showed that the plaintiff was wanted by the police for an offence under the Dangerous Drugs Act 1952 ('the DDA 1952'). Immediately, the plaintiff was arrested. He was brought first to IPD Dang Wangi and at about 7.30pm on

the same day, the plaintiff was taken to IPD Brickfields at Sri Petaling, specifically to the Narcotics Division for further investigation ('the first arrest and detention').

[8] At or about 10pm on 20 December 2017, the plaintiff was informed by a police officer that he would be immediately released without charge and/or further investigation as the police had found out that even though the PDRM Database did identify the plaintiff's IC as being the person wanted by the police, the plaintiff did not fit the photofit of the wanted person and that wanted person had wrongly used the plaintiff's IC number. The plaintiff was later informed that the wanted person who had purportedly misused his IC was one Mohd Shukri Rao bin Abdullah ('Shukri Rao'). On 22 December 2017, the plaintiff lodged a police report ('the first Police Report') in which he narrated the details of the first arrest and detention and denied any involvement in the offences to which the PDRM Database referred to the plaintiff's name and IC number.

[9] Fast forward, a year and half later, on 10 May 2019, between 9pm and 9.30pm, the second defendant together with other police officers who were carrying out 'Ops Rentap' in and around the area of Jalan Khoo Teik Lee, Off Jalan Imbi, Bukit Bintang, approached the plaintiff and asked him to provide his IC. The second defendant then conducted a criminal record search on the plaintiff and was told him that the PDRM Database showed that the plaintiff had committed several serious crimes and that the plaintiff was wanted by the police for an offence under the DDA 1952. The plaintiff attempted to explain to the second defendant that this was a case of mistaken identity and that he had all the details in his mobile phone. However, this was ignored by the second defendant who then arrested the plaintiff and the latter was brought to IPD Dang Wangi ('the second arrest and detention'). At IPD Dang Wangi, the second defendant lodged his arrest report, THSL/13274/19 ('the second defendant's Arrest Report in 2019').

[10] The second day, 11 May 2019, the magistrate, upon such application by the first defendant, granted the remand order for three days until 13 May 2019 ('remand order'). On 13 May 2019, the first defendant informed the plaintiff that he would be released on police bail later the same day. The plaintiff was handcuffed and brought to the narcotic department in IPD Dang Wangi to carry out urine test. Thereafter, the plaintiff's finger prints were taken and then he was brought to the first defendant's office where the plaintiff's statement was recorded. Later, the police bail document (*surat perjanjian and jaminan*) was given by the third defendant to the plaintiff and his son, acting as the plaintiff's guarantor at that time.

[11] On the day following his release on police bail, the plaintiff conducted a search at the National Registration Department ('JPN Search') on his own IC number and found out that no other person bore the same IC number beside himself. About a month later, on 17 June 2019, the plaintiff went to IPD Dang Wangi and lodged a police report THSL/016761/19 ('the second Police Report') wherein the plaintiff detailed the event of the second arrest and detention and that this was a case of mistaken identity. The plaintiff had also, in the second Police Report, requested the police to investigate the matter, in particular on Shukri Rao's misuse of the plaintiff's identity and for the police to clear the plaintiff's name from the PDRM Database.

[12] Later, the plaintiff met the first defendant wherein he was informed that no further date would be fixed for the plaintiff under the police bail and that the first defendant would inform him if there were any changes.

[13] Prior to the second arrest and detention, the plaintiff had just begun working as Grab driver on 6 May 2019. On 9 May 2019, he was informed by Grab that his account had been terminated due to a failed background screening. Further inquiries by the plaintiff led to the discovery that Grab had conducted a criminal record check on the plaintiff and found that he had 'previous criminal record'.

[14] Deprived by the situation, the plaintiff filed this suit ('this action') for, inter alia:

(a) a declaration that the plaintiff's arrest and detention on 20 December 2017 and 10 May 2019 were unlawful;

(b) a declaration that Remand Order dated 11 May 2019 was wrongfully obtained by the defendants without sufficient cause;

(c) a declaration that the police bail granted on 13 May 2019 to the plaintiff was unlawful;

(d) a declaration that the plaintiff's constitutional rights were infringed;

(e) an injunction to compel the defendants within seven days from the court's order so as to ensure that the plaintiff and his identity card number is no longer mistaken for and/or associated with that Mr Shukri Rao and/or for offences whether under the Dangerous Drugs Act 1952 or otherwise; and

(f) damages.

THE PLAINTIFF'S CASE

[15] The crux of the plaintiff's case is that the plaintiff's arrests and detentions by the defendants were wrongful and unlawful.

THE DEFENDANTS' CASE

[16] In essence, the defence put up by the defendants is a simple and straightforward one: that the plaintiff's arrest and detention was lawful and in accordance with the law. It is also the defendants' case that the defendants had taken all reasonable and proper action and there was no wrongdoing on their part. In particular, the defendants contended that there was no first arrest and detention as alleged since there is no record of any arrest report in any police station.

[17] In relation to the PDRM database, the defendants had asserted, inter alia that:

(a) they had taken all adequate or effective measures and/or precautions to ensure that the information in PDRM Database is accurate and there are no errors;

(b) the defendants' system of checking is adequate to ensure that there are no errors in PDRM database;

(c) the defendants have provided and/or maintained a proper and accurate PDRM database; and

(d) the defendants have protected and safeguarded the plaintiff from arrest and detention based on wrong information in PDRM Database.

THE TRIAL

[18] The plaintiff called upon three witnesses during trial. They were:

(a) SAC Abd Rahman bin Atan (SP1);

(b) Thayanantha Rao a/l Bala Krishna (SP2); and

(c) Devinthra Rao a/l Thayanantha Rao (SP3).

[19] Meanwhile, the defendants' witnesses were:

(a) Kpl Hamdan bin Jamaludin (SD1); and

(b) Sjn Muhammad Izwan bin Izham (SD2).

[20] As agreed by parties prior to the trial, the following were the issues to be tried in this action:

(a) whether the second defendant had detained the plaintiff in accordance with the law;

(b) whether the defendants took reasonable steps to put and/or update the details in the Police Database;

(c) whether the first, second and/or third defendants had contravened, violated and/or breached inter alia their statutory duties, the Federal Constitution and the rules of natural justice when they arrested and detained the plaintiff;

(d) whether the first, second and third defendants (who were under the control and supervision of the fourth and sixth defendants) had committed tort misfeasance;

(e) whether the seventh defendant is vicariously liable for the actions, conducts and failures of the defendants;

(f) whether the defendants, by their conduct and actions, had caused the plaintiff to suffer loss and damage; and

(g) whether the plaintiff is entitled to the declarations, reliefs and damages as claimed.

DECISION AND FINDINGS OF THE COURT

[21] After perusing the evidence and testimonies rendered throughout this Action and the submissions and replies by the parties, I allow the plaintiff's claim with global damages of RM250,000. Herein are my reasons.

Burden of proof

[22] The law is crystal clear that where the case rests on unlawful detention, the cardinal principle is that every detention is prima facie unlawful and the burden of proof lies on the detainer to justify it (see *Johara bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139, *Bohar Singh Khera v Secretary of State for the Home Department and another appeal* [1983] 2 WLR 321 which was followed in *Abdul Ghani Haroon v Ketua Polis Negara and another application* [2001] 2 MLJ 689). Bearing this in mind, I have analysed the plaintiff's case here based on the following:

(a) negligence and breach of duty of care and statutory duties;

(b) breach of natural justice and cpc provisions; and

(c) misfeasance in public office

Negligence and breach of duty of care and statutory duties

A **[23]** The plaintiff has listed down numerous claims against all the defendants. These are the main claims against the first defendant:

(a) he was negligence when he failed to exercise due care in his investigation into the Report in 2017 ('Chow Kit Report') which in no uncertain terms, directly caused and led the plaintiff's wrongful and unlawful second arrest and detention; and

B

(b) he had contravened and violated statutory duties, the provisions of the Criminal Procedure Code ('CPC') and the Federal Constitution ('FC') during the period of the plaintiff's second arrest and detention.

C

[24] That is to say, the plaintiff's second arrest and detention in 2019 had its origin in the action and conduct of the first defendant back in July 2017, where in the course of his investigation into the Chow Kit Report, the first defendant had failed to correctly identified the suspect in the Chow Kit Report.

D

[25] The plaintiff further submitted that even though the suspect in Chow Kit Report arrested on 7 July 2017 by Insp. Zakaria bin Anas had on three separate occasions, identified himself as 'Mohd Shukri Rao bin Abdullah' ('Shukri Rao') to three different persons and it was noted on three different official documents that the suspect was this Shukri Rao, the first defendant had nevertheless recorded in his investigation paper ('Chow Kit IP') that the suspect arrested on 7 July 2017 was Thayanantha Rao a/l Bala Krishna, namely the plaintiff in this case.

E

F

[26] This argument brings us to three important documentary evidences mentioned earlier. The first of these is the Chow Kit Report lodged by Insp. Zakaria bin Abas on 7 July 2017 (p 31 of B1) where the suspect had verbally identified himself as Mohd Shukri Rao bin Abdullah.

G

[27] The second document here is the police document (Pol.R.J.2) containing the suspect's finger prints taken by L/K Mohd Faiz on 7 July 2017 (p 59 of B1) where again, the name of the suspect in the said document was identified as Shukri Rao.

H

[28] Thirdly, the magistrate remand minutes dated 8 July 2017 (p 20 of B1) where it was clearly shown that the name of the suspect, as recorded by the magistrate, was Mohd Shukri Rao bin Abdullah.

I **[29]** Despite all of these documents mentioned above, the first defendant had recorded the plaintiff's name 'Thayanantha Rao a/l Bala Krishnan' as the suspect's name instead of 'Mohd Shukri Rao bin Abdullah'. This can be seen in the *Borang Hak-Hak Orang Ditangkap (Seksyen 28A Kanun Tatacara Jenayah)* (p 28 of B1, encl 55) and *Surat Pemberitahuan YBGK* (p 29 of B1, encl 55),

both dated 7 July 2017 which were signed by the first defendant.

[30] In his testimony during trial, the first defendant had candidly testified that even though his investigation into the Chow Kit Report was completed and charges had been preferred against the suspect, Shukri Rao in 2017, he did not, at any point take any steps to properly identify the suspect in the Chow Kit Report and at all times, had recorded the name of Thayanantha Rao a/l Bala Krishna as the suspect in the Chow Kit IP (see NOP, p 97):

> JR: Tujuh belas. Anda mempunyai kad memeluk agama Islam suspek dalam IP 2017. Ini keterangan anda ya. Anda mempunyai keempat-empat dokumen yang saya rujuk kepada anda berkaitan dengan tangkapan Chow Kit 2017. Soalan saya kepada anda. Setuju dengan cadangan saya, terdapat nama-nama yang berbeza dimasukkan ke dalam keempat-empat dokumen yang telah saya rujuk kepada anda tadi, iaitu dua dokumen official yang masuk Mahkamah adalah Mohd Shukri Rao Abdullah, dua dokumen penyediaan anda adalah Thayanantha Rao, setuju?
>
> SD2: Setuju.
>
> JR: Sebagai seorang anggota polis, lebih lebih lagi sebagai seorang IO, Sarjan, adakah anda membuat sebarang siasatan lanjut mengapa nama-nama ini berubah-ubah. Atau kamu hanya mengambil dasar dia dah memeluk Islam, nama lama dan nama baru, saya boleh ulang-ulang pakai?
>
> SD2: Soalannya?
>
> JR: Soalan dia. Kita dah tahu dah, ada dua nama bagi satu suspek. Dokumen tadi jelas iaitu pemberitahuan YBGK oleh anda, hak untuk tangkap oleh anda, Chow Kit Repot, nama tangkapan adalah Thayanantha Rao. Betul?
>
> SD2: Betul.
>
> JR: Betul ya? Lepas tu, kita ada laporan tangkapan suspek Chow Kit Repot mengatakan bahawa nama lisan adalah Shukri Rao Abdullah, setuju?
>
> SD2: Setuju.
>
> JR: Dan kamu telah rujuk kepada reman kes ini di mukasurat 30. Ini adalah dokumen Mahkamah. Nama bukan Thayanantha tapi Shukri Rao.
>
> SD2: Betul.

[31] It is worth noting at this juncture that, the first defendant had testified that the PDRM Database is linked to JPN, KWSP and SPR's systems and that a JPN search can be done 'on the spot' (see NOP, p 79):

> JR: Dan Sarjan, setuju dengan saya bahawa sistem PDRM juga terikat dengan sistem JPN, sistem KWSP dan sistem SPR?
>
> SD2: Setuju Tuan.
>
> JR: Jadi apa jua carian JPN boleh dilakukan on the spot?

SD2: Setuju Tuan.

[32] Therefore, despite such instantaneous search tools available , the evidence shows that the first defendant made no attempt to verify and ratify the suspect's actual and correct identity. After a thorough perusal on the printout of the PDRM Database (p 102 of B1, encl 55), it bears emphasis that the plaintiff's photograph in the PDRM Database is in no way resembles the photograph in Shukri Rao's 'kad muallaf' (p 112 of B1, encl 55). A simple glance at the two documents would immediately spot the flaring mistaken identity here.

[33] The plaintiff further submitted that after the plaintiff's second arrest and detention, the first defendant again failed to check the Chow Kit IP containing Shukri Rao's police photograph and compared it with the PDRM Database (that was linked to the JPN Search), which would show a photograph of the plaintiff. If only this was done, it would be obvious as to who was indeed the suspect in the Chow Kit Report and the plaintiff would never be wrongfully detained and arrested (see NOP, p 117):

JR: Jadi apa yang anda sedang bagitahu di Mahkamah walaupun seseorang itu adalah seseorang yang tak bersalah, anda tak boleh tahu betul tak betul orang itu adalah pesalah tepat atau tidak kerana maklumat tidak ada dalam sistem PDRM.

SD2: Betul.

JR: Jadi, kalau macam itu Sarjan, siapa-siapa akan mengalami risiko di atas tangkapan salah, setuju?

SD2: Setuju.

[34] Based on the above, I am in agreement with the plaintiff that the first defendant's failure to carry out what we assume would be the most basic and typical investigative practice to check or at least verify the suspect's identity, tantamounts to a sheer negligence and breach of statutory duties in the performance of a police function.

[35] In other words, following the plaintiff's first arrest and detention and the later finding and release of the plaintiff, the first defendant had failed to take reasonable steps to change or amend the PDRM Database to ensure that the plaintiff's name was no longer in the system. I am of the view that the first defendant had, by omission, negligently left the plaintiff's name and IC on the PDRM Database when the first defendant knew very well that the plaintiff was not Shukri Rao and the plaintiff was not in any way connected to the offences purportedly carried out by Shukri Rao.

[36] I will now delve into the cardinal issue in this case, that is, whether the act of the first defendant in not updating the PDRM Database upon the plaintiff's first arrest and detention is legally wrong.

[37] In this case, the first defendant was the police officer responsible for conducting an investigation into the plaintiff's first arrest and detention. However, the plaintiff premised that he had breached his duty as a police officer by failing to update the PDRM Database after discovering that the plaintiff was not identical to the individual named Shukri Rao.

[38] The first defendant also knew that the crook named Shukri Rao had used the plaintiff's identification number for deceptive purposes and was aware of the existence of police investigation papers on the said Shukri Rao before but had failed to use his authority and responsibility to investigate more thoroughly and subsequently update the PDRM Database.

[39] The first defendant's failure has caused hardship to the plaintiff, as he was detained again in 2019 and was remanded for three days. In other words, the second arrest and detention should and would not have happened if the first defendant had done his duty in 2017 and had updated the PDRM Database.

[40] After a thorough analysis of the entire spectrum of information presented before this court, the defendants argued that the plaintiff's second arrest and detention in 2019 was carried out in accordance with the law. The second defendant testified that he made a phone call to check the criminal records with the IPD Dang Wangi Control Center. The results revealed that the plaintiff's IC number had eight previous records. The plaintiff also has one outstanding record wanted by the police related to Chow Kit Report for a drug offense. Hence, the defendants contended that the existence of the report itself is sufficient evidence that the detention requirement has been met (see *Lee Cher Joo @ Lee Sujan & Anor v Mohd Sharif bin Othman & Ors* [2009] 9 MLJ 352; [2009] 6 CLJ 165, *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219, *Saul Hamid bin Pakir Mohamad v Inspektor Abdul Fatah bin Abdul Rahman & Anor* [2007] 6 MLJ 47; [2007] 5 CLJ 93).

[41] On this issue, I am guided by the spex court's judgment in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141, where Balia Yusof FCJ explained:

> [36] Before the learned JC too, the issue of whether the arrest was lawful or otherwise was never dealt with. Focus was given more to the detention itself. Be that as it may, we are in agreement with the Court of Appeal that *whether there was wrongful arrest or not depends on whether the police had reasonable or probable cause to effect the arrest on the respondent which depends on whether the police had credible*

information or held reasonable suspicion as to the commission of the offence. The case of *Masa ak Nangkai & Ors v Sgt Edwin Nancha & Anor* [2005] 1 MLJ 581; [2004] 1 LNS 495; cited in the Court of Appeal's judgment explains the requirements of s 23 of the Criminal Procedure Code on such power of arrest by the police (see also: *Saul Hamid Pakir Mohamad v Inspektor Abdul Fatah Abdul Rahman & Anor* [1999] 1 LNS 83). (Emphasis added.)

[42] Hence, the question whether there was wrongful arrest and detention would very much depend on whether the police had reasonable or probable cause to effect the arrest in that they had received credible information or held a reasonable suspicion as to the commission of an offence.

[43] Referring to the cases above, the police can only detain the plaintiff if they have credible information or reasonable suspicion that the plaintiff has committed an offence. However, in this case, the initially credible information was based solely on the identification number, which was later revealed by the defendants themselves to be a case of mistaken identity, as the individual named Shukri Rao had intentionally used the plaintiff's identification number for deceptive purposes. The first defendant knew this all alone and had neglected to do anything in 2017 and in 2019.

[44] The first defendant should have immediately updated the Police Database in 2017 upon receiving this information to prevent a repeat or reoccurrence of the wrongful arrest. Unfortunately, the first defendant failed to do so, and this police failure had resulted in yet another detention of the plaintiff in 2019, subsequently causing trauma to the plaintiff and affecting his life and liberty.

PDRM Database

[45] The defendants have raised two significant points concerning the record in PDRM Database. First they questioned the rationale for plaintiff to only name the first and second defendant in the action when the PDRM Database printout (p 102 of encl 55) shows that there were multiple other instances where the plaintiff has been mistakenly identified in police cases from 2011. Secondly, the defendants' alleged that the plaintiff himself is at fault for not following up on his police report.

[46] The plaintiff rebutted this by stating that he is entitled by law to file a case against whoever he wishes, subject only to the proviso that there is a valid cause of action and that there is sufficient proof to support his case. As for the second point on the issue of the plaintiff's fault, the plaintiff's counsel submitted that this issue was never pleaded by the defendants in their defence and thus could not be relied upon by them.

[47] It is the view of this court that the plaintiff's failure to follow up on the police report lodged by him does not absolve the first and second defendant from any liability. After all, s 120 of the CPC states that every police investigation shall be completed without unnecessary delay and it is abhorrent if the plaintiff could be blamed for not following up on the report when the duty and burden lies on the police to complete their investigation without delay.

Wrongful issuance of RJ10A notice

[48] I will now deal with the integral issue of the wrongful issuance of RJ10A Notice which the plaintiff claimed had led to the plaintiff's second arrest and detention.

[49] It is apt to note that in the course of cross-examination, it appears that the magistrate hearing the case against Shukri Rao for the Chow Kit Report had ordered a discharge not amounting to an acquittal (DNAA) as the chemist report and exhibits could not be furnished to the court in time. Following this, the deputy public prosecutor had given instructions for Shukri Rao to be re-charged (see NOP, pp 102–103):

> SD2: Sebab barang kes dan laporan kimia belum terima, Mahkamah telah DNAA kan kes.
>
> JR: Ok. Alright. Jadi, di atas Mahkamah melepaskan tanpa membebaskan suspek ketika itu akibat kelewatan kehadiran barang kes ke Mahkamah, tanpa salah Shukri Rao bin Abdullah, anda telah memasukkan nama dia sebagai wanted. Ataupun anda telah berusaha untuk mencari sampai dia tak dapat?
>
> SD2: Sampai dia tak dapat, maksud?
>
> JR: Dia dilepaskan secara sah.
>
> SD2: Betul.
>
> JR: Dia tak lompat jamin. Dia tak hadir Mahkamah bukan dia tu. Ertinya dia dilepaskan tanpa dibebaskan.
>
> SD2: Betul.
>
> JR: Di bawah Kanun Acara Jenayah. Soalan saya kepada anda, di atas dasar apa, anda telah masukkan nama dia sebagai wanted?
>
> SD2: Atas arahan tuduhan semula oleh YA Timbalan Pendakwa Raya.
>
> JR: Alright. Kalau tuduh semula, tak dapat cari dia?
>
> SD2: Tak dapat cari, maksudnya?
>
> JR: Bila arahan dah keluar untuk tuduh dia semula, kamu mesti ada ambil langkah-langkah untuk mengesan Shukri Rao bin Abdullah.
>
> SD2: Betul. Melalui penciptaan wanted person.

[50] In his own accord, and without first checking Shukri Rao's name and

address neither through JPN records nor the address stated in the 'kad muallaf', the first defendant testified that he proceeded to issue the RJ10A notice against the plaintiff, publishing and broadcasting it in the PDRM Database for all police officers throughout Malaysia to be notified that the plaintiff was wanted in relation to the Chow Kit Report (see NOP, pp 103–106):

> JR: Bila arahan dah keluar untuk tuduh dia semula, kamu mesti ada ambil langkah-langkah untuk mengesan Shukri Rao bin Abdullah.
>
> SD2: Betul. Melalui penciptaan wanted person.
>
> JR: Lagi wanted. Mengapa tak panggil dia? Nombor telefon, atau apa-apa dalam IP, sudah tentu ada siasat.
>
> SD2: OKT merupakan 'gedendangan'.
>
> JR: Come again, sorry?
>
> SD2: OKT, orang yang kena tangkap, Shukri Rao merupakan 'gededangan', tiada tempat tinggal, tiada pekerjaan tetap, tiada membeli phone dan tiada.
>
> JR: So, tiada apa-apa maklumat langsung pasal Shukri Rao bin Abdullah.
>
> SD2: Tiada data.
>
> JR: At least tanya boss.
>
> SD2: Dia tak kan bagi.
>
> JR: That. Itu saya tak dapat. Saya faham. I totally understand ya. Kita beralih kepada soalan yang lain. Ok sekarang ini, balik kepada soalan kita, *memandangkan anda telah memasukkan nama Plaintif sebagai wanted, setuju anda memasukkan nama orang salah, identiti orang salah sebagai wanted iaitu nama Plaintif dalam sistem?*
>
> SD2: *Setuju.*
>
> JR: Sarjan, hanya kita tuju balik kepada jawapan anda. Anda kata ini Shukri Rao Abdullah ini apa encik, saya kata nama yang terpakai tadi tu, saya tak faham nama dia, dia ni memang tak ada apa-apa identiti ataupun tak ada pengenalan, tak ada tempat tinggal, tak ada nombor kerja, tak ada nombor telefon. Apa nama yang dia panggil?
>
> SD2: Gelandangan.
>
> ...
>
> JR: Alright. Rujuk kepada mukasurat 28 sekali lagi, Sarjan.. Ia itu tandatangan di atas, di bawah Thayanantha Rao. Itu adalah tandatangan Shukri Rao?
>
> SD2: Betul, setuju.
>
> JR: Bukan tandatangan Plaintif ya?
>
> SD2: Betul.
>
> JR: Dan segala siasatan ini, bukan terhadap Encik Thaya. (Emphasis added.)

[51] Thus, in the first place, there was no legal basis for a RJ10A notice to be issued against Shukri Rao, considering the fact that at all material times, Shukri Rao had been legally and by order of the court given a discharge not amounting to acquittal. Even if there was such legal basis, by his own testimony, the first defendant had never taken any steps to try to locate Shukri Rao before issuing the RJ10A notice. He claimed that the suspect (Shukri Rao) was homeless. Ironically, this was done despite the fact that the plaintiff's address was in Kajang (as per JPN Search) and the address stated in Shukri Rao's *kad muallaf* was in Sungai Besi, Kuala Lumpur. Besides, as shown in the PDRM Database, Shukri Rao had been convicted in relation to Sri Petaling Report 011016/17 sometime in 2017 and was likely in jail or under rehabilitation or supervision by the *Agensi Dadah Kebangsaan* (AADK) at all material time.

[52] Most bizarre of all, all the documents shown that the culprit involving in the drug abuse is 'Shukri Rao'. Even the record in the magistrate shown this. There is no basic for the first defendant to record and to key in the plaintiff's name in the wanted list! As noted in the notes of proceeding stated above (and emphasised), the first defendant had admitted he had done it wrongly.

[53] Hence, it can be said that the blunder act of the first defendant's issuance of the RJ10A Notice in the PDRM Database had caused a grave injustice to the plaintiff, and as consequence thereof, had led to the plaintiff's second arrest and detention by the second defendant. What is more intriguing is not only the wrong issuance of RJ10A Notice stating the plaintiff's name, but also, the first defendant and the second defendant's blatant ignorant of the plaintiff's plea to check the details he had saved in his mobile phone regarding the wrongful arrest and the wrongful identity during the second arrest and detention.

Failing to take cognizance of the plaintiff's explanation of mistaken identity

[54] I shall now discuss the issue whether the second defendant's and also the first defendant's inaction to investigate the plaintiff's explanation of mistaken identity amounts to a breach of duty of care.

[55] It is apt to note that the difference between an act and an omission as a legal wrong is that in the former, a positive act of the defendant causes harm to the plaintiff, but in the latter, inaction on the part of the defendant causes harm to the plaintiff. The general principle is that a person must not harm others, but at the same time he does owe a duty of care to do something for the benefit of another. There are, however instance where omissions may give rise to a duty of care. The law provides three general groups of scenarios where an individual has

a duty to act — where the defendant has control of a situation, where the defendant has assumed responsibility, and where the defendant has created or adopted a risk.

[56] Control situations arise where a defendant has a high degree of control over an individual (and thus is held as owing a duty to exercise that control responsibly. In *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360, the police were held responsible after an inmate on suicide-watch was able to kill himself, after the custody officer left the hatch open on his cell, allowing the inmate to attach his shirt and use it as a noose. This involved an omission (to close the hatch), but because the police had control over the cells, they had a duty to act.

[57] In essence, one can ask 'who is in charge?' when looking for a control situation. If the answer to that question is 'the defendant', then this will be a control situation.

[58] During the trial, the plaintiff testified that he had informed not just the arresting officer, the second defendant, but also the other police officers in IPD Dang Wangi, that this was a case of mistaken identity. He continued by mentioning that he had been previously arrested in 2017 but released afterwards after the police found out that someone had unlawfully misusing his identity (see PWS2, pp 4 to 6) He had informed them that all the information/documents were in his mobile phone. His plea for them to take a look at his mobile phone was however, totally ignored!! It is undeniable that despite the continuous explanation uttered by the plaintiff, the second defendant did nothing to investigate or at least verified the matter. This is further fortified by the fact that the plaintiff's testimony was never challenged by the defendants during the trial. Moreover, the defendants had also failed to challenge the evidence of SP3, the plaintiff's son, who gave testimony that those documents which proved the mistaken identity had been showed to the first defendant on 11 May 2019 (which the first defendant did not take). The same documents were subsequently given by SP3 to the first defendant on 13 May 2019. The law is trite that the failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of a witness's testimony (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). Hence, this part of the evidence had been properly established.

[59] The first defendant in his witness statement admitted that he had received a phone call from a man, claimed to be the plaintiff's family, who had pleaded for the first defendant to release the plaintiff as he never committed any offence. The first defendant then replied he had to inform his superior and the latter had instructed the first defendant to investigate the matter (see DWS1 p 3):

S7: Selepas Permohonan Reman selesai apa yang berlaku? A

J: Pada 11.05.2019, jam lebih kurang 4.30 petang, *saya telah menerima panggilan telefon dari seorang lelaki yang mengakui saudara Plaintif dan meminta supaya Plaintif dibebaskan kerana Plaintif tidak pernah terlibat dengan mana-mana aktiviti jenayah.* Saya, memaklumkan bahawa siasatan lanjut perlu dijalankan terhadap Plaintif dan permohonan reman Plaintif selama tiga hari telah pun diperolehi. B

S8: Apa yang berlaku selepas itu?

J: Saya kemudian telah memaklumkan perkara berkenaan kepada Ketua Bahagian Siasatan Jenayah Narkotik Daerah Dang Wangi DSP Zahari Bin Mohamed Noor dan telah memberi panggilan telefon 'ASP KARTHI' kepada beliau. *Arahan beliau selanjutnya, KBSJND meminta saya supaya menjalankan siasatan selanjutnya untuk menentukan kesahihan maklumat dari 'ASP KARTHI' tersebut.* (Emphasis added.) C

[60] Thus, this court is of the view that the first defendant was obliged, in fact compelled by law to investigate into the plaintiff's explanation of mistaken identity. If the plaintiff's explanation was found to be true, then there would be no basis for him to continue the plaintiff's detention at IPD Dang Wangi and hence the plaintiff must be immediately released unconditionally. D

[61] Yet, as explained during cross-examination, the first defendant did not immediately investigate the matter. Nor did he investigate the truth of the information given by the plaintiff and SP3 concerning mistake identity. The first defendant testified during trial that he did not investigate whether the correct suspect was arrested but rather who ASP Karthi was (see NOP, p 122). E F

[62] Now that the first defendant had bunch of information in his hand, (the JPN Search and the plaintiff's first Police Report given by the plaintiff and SP3 and the plaintiff's explanation that this was a case of mistaken identity), all he needed to do was to check the Chow Kit IP to see if the plaintiff was the correct suspect. He could also check to see if the plaintiff matched Shukri Rao's police photograph taken upon his arrest in 7 July 2017. Besides, he could check to see if the plaintiff's fingerprints matched that of Shukri Rao. Otherwise, he could verify whether the correct suspect had been arrested for the Chow Kit Report. After all, all these documents were in his custody and possession as the IO and the custodian of the Chow Kit IP. It was him who 'wrongfully' entered and keyed in the plaintiff's name in the PDRM Database and issued the RJ 10A Notice and listed the plaintiff's as 'wanted' in 2017! G H

[63] However, the first defendant did none of the above. The first defendant claimed that he could not get his hands on the Chow Kit IP since it was locked in a room, and the keys were in the hands of the IP Warden who was a clerk that only worked during office hours (see NOP, p 138): I

JR: Kalau begitu, adakah bilakah anda telah mendapatkan kertas siasatan?

SD2: Pada hari Isnin.

JR: Mengapa pada hari Isnin?

SD2: Sebab kertas siasatan disimpan di pejabat IP Warden.

JR: Di mana?

SD2: Di pejabat.

JR: Siapa IP Warden.

SD2: Kerani awam yang uruskan pengurusan IP.

JR: Walaupun ada seorang suspek yang menyatakan saya bukanlah orang yang sebenar membuat kesalahan, tolonglah periksa aduan saya. IP adalah di bawah pengelolaan anda, anda merupakan pegawai penyiasat IP tersebut, mengapa anda mengambil tiga hari untuk mengesahkan pengesahan Plaintif?

SD2: Sebab nak melalui IP Warden.

[64] I find this explanation unreasonable and flies against the entire purpose and object of s 28(2) of the CPC. It is preposterous for the first defendant to claim that they cannot investigate during weekend, or they cannot get their hands on the IP during weekends. After all, the price of an individual's liberty and freedom was at stake here.

Conduct post second arrest and detention

[65] While the second arrest and detention in 2019 in itself was merely a routine operation and I have not issue with its validity, the conduct of the defendants (in particular the first defendant and the second defendant) before, during and after the arrest is the main focus here.

[66] It is undisputed facts that the second defendant was the arresting officer of the plaintiff for the second arrest and detention and the maker of the second defendant's arrest report in 2019. It is the plaintiff's case that the second defendant had breached his statutory duties and common law duty of care when he:

(a) conducted a body search for the plaintiff before arrest, in contravention to s 20A(1) of the CPC;

(b) failed to inform the plaintiff his rights to inform his family of his whereabouts and his right to consult legal practitioner as envisaged in art 5(3) of the FC and s 28A of the CPC; and

(c) failed to perform his common law and statutory duties as a police officer.

[67] The defendants have sought to allege that the plaintiff had failed to plead the specific statutory provisions breached by the second defendant and

the third defendant and further alleged that the plaintiff does not fall under any class of persons who are protected.

[68] As for the first allegation, I disagree with the defendants. A thorough perusal of the plaintiff's statement of claim showed that there was sufficient particularity as to the provision of law, under which the plaintiff alleges were breached and contravened by each of the defendants (para 38 to 40A of the plaintiff's statement of claim).

[69] Besides, it is trite law that any issue not pleaded may be allowed if the issue not pleaded was nevertheless freely ventilated by parties without objection (see *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 and *Yogananthy a/p AS Thambaiya v Harta Pusaka Idris bin Osman* [2020] 5 MLJ 455). Hence, even if the particulars in the pleading were lacking as claimed, the defendants had not by any means during the trial raised any objection regarding this. Hence, it is a non issue here.

[70] As submitted by the plaintiff, the federal counsel's argument that the first and second defendants do not owe a specific statutory duty to the plaintiff was misconstrued and had ignored the very purpose of the enactments of the CPC. The plaintiff asserted that the first defendant, in his performance of his police duties also committed grave breached of s 28A of the CPC and the law which provisions were enacted primarily to safeguard a person's liberty as guaranteed by art 5(1) of the FC. The Federal Court had, in the case of *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116, thoroughly discussed the issue on the right to consult a lawyer under s 117 of the CPC.

[71] In similar veins, in *Hassan bin Marsom & Ors*, the Apex Court held that in considering an application for a remand order, a magistrate must balance fairly between the right of a personal liberty of an individual who has not been proven guilty of an offence, against the equally important public interest vis a vis the duty of the police to investigate crimes. It involves an exercise of discretion and that discretion must be exercised judicially and is subject to the court's scrutiny (see also *Hashim bin Saud v Yahaya bin Hasim & Anor* [1977] 1 MLJ 259 and *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50).

[72] The plaintiff in his witness statement testified that he was not informed of his right to inform his family of his whereabouts nor of his rights to consult with a legal practitioner of his choice. The plaintiff's evidence was not challenged by the defendants during trial. No question was posed to the plaintiff during cross-examination on this. The plaintiff's counsel further argued that the inequity suffered by the plaintiff becomes more striking when the plaintiff's second arrest and detention was compared with Shukri Rao's arrest in 2017.

[73] The first defendant had, plainly afforded Shukri Rao his s 28A (of the CPC) rights, Shukri Rao was made to sign a document confirming that he was informed of his rights vis a vis the *Borang Hak-Hak Orang Ditangkap* (p 28 of encl 55).

[74] In additions thereto, there is also a document titled *Pemberitahuan YBGK* prepared by the first defendant (p 29 of encl 55) that shows that the YBGK had been informed of Shukri Rao's arrest on 7 July 2017. Moreover, the magistrate's remand minutes (p 30 of encl 55) revealed that a representative from YBGK appeared on behalf of Shukri Rao in 2017 during the remand proceeding.

[75] Yet, no such procedure was observed and no documents were prepared by the first defendant in the case of the plaintiff's second arrest and detention and no lawyer or representative from YBGK appeared on behalf of the plaintiff during the remand proceeding.

[76] When the plaintiff's counsel posed the question on the reason such documents were not prepared in 2019, the first defendant had not given any satisfactory answer (see NOP, p 129).

[77] The plaintiff postulated that the first defendant had breached s 28(3) read with s 117 of the CPC and art 5(4) of the FC when he failed to carry out any investigation in the first 24 hours of the plaintiff's arrest which was also candidly and unequivocally admitted by the first defendant during cross-examination (see NOP, p 118).

[78] Further during his cross-examination, the first defendant also testified that even though he was in his office on the night of the plaintiff's arrest, he did not take any steps to meet the plaintiff who was in the lockup.

[79] All he did was to cancel without checking the RJ10A notice record by the *Penyata Pembatalan Rekod Orang Dikehendaki* (RJ21) (p 61 of encl 55). The record shows that the cancellation was done at 0012am, on 11 May 2019 (see NOP, pp 118–119):

> JR: Sekarang soalan saya, anda tak siasat dalam 24 jam, setuju? Terus masuk dalam lokap untuk reman.
>
> SD2: Setuju.
>
> JR: Dan anda telah membuat pembatalan tersebut tanpa mendapat tahu betul tak butiran-butiran orang yang ditangkap itu adalah orang yang tepat, setuju?
>
> SD2: Setuju.
>
> JR: Anda tidak mengikut prosedur Kanun Acara Jenayah untuk siasat 24 jam

sebelum reman dipohon. Jadi anda secara automatik anggap dah tengah malam dah, saya ambil reman 3 hari uruskan siasatan, setuju?

SD2: Tidak setuju.

JR: Jadi mengapa tak jumpa dengan pihak suspek yang ditangkap pada malam itu, sedangkan anda berada dalam pejabat?

SD2: Bahawa DS telah turun ke lokap.

JR: Anda ada akses ke lokap?

SD2: Betul.

JR: Kenapa tak jumpa dia di lokap walaupun dia di lokap?

SD2: Sebab saya sudah mohon reman dan untuk.

JR: Belum lagi mohon reman. Reman belah pagi. Kita tengah malam.

SD2: Itu sebab saya mohon reman untuk jumpa dengan YBS keesokan harinya.

JR: Jadi, anda tak jumpa apa-apa untuk mengambil tindakan walaupun anda berada di dalam pejabat sehinggalah hari selepas reman, setuju?

SD2: Tidak setuju, saya ambil tindakan pembatalan rekod.

JR: Itu sahaja.

SD2: Betul.

JR: Jumpa tertuduh Plaintif langsung tak ada.

SD2: Betul.

JR: Sekarang, anda juga telah dalam. Sekarang ini anda kata nak bersiasat, betul? Itu la anda mengambil tempoh reman 3 hari.

SD2: Betul.

[80] Following the first defendant's unequivocal admission that he had not carried out any investigation in the first 24 hours, the plaintiff claimed that the first defendant was not permitted by law to apply for remand under s 117 of the CPC since the said law only exercisable if the investigation cannot be completed within 24 hours.

[81] According to s 117 of the Criminal Procedure Code, before any remand application is made, an investigation must be conducted within the initial 24 hours. The police must record in the investigation diary the investigations carried out within this 24 hour period before a remand application can be approved.

[82] However, in this case, the second defendant admitted to not conducting any investigation within the initial 24 hours and subsequently

made a remand application 'to seek an extension of time for further investigation' of the plaintiff. This constitutes an obvious case of abuse of process. If the second defendant had conducted an investigation within the initial 24 hours, a remand application would not have been necessary, and the plaintiff could have been released on the same day.

[83] Mohd Sofian Abd Razak JCA in the recent Court of Appeal case of *Zaidah bt Ismail v Inspektor Rabiatul Adawiayah bt Mohd Noor & Ors and another appeal* [2021] MLJU 2109 could not be clearer when he held that:

> [45] *In the circumstances, the first defendant being the investigating officer ought to have objectively analysed the facts to make a proper and valid judgment that it was unnecessary to arrest and detained the first plaintiff.* However, the first defendant had failed to do so, resulting in the unlawful arrest and detention of the first plaintiff. *We find that there was no credible information before the first defendant for any reasonable suspicion to arise that the first plaintiff had committed a seizable offence under ATIPSOM, or for that matter under any other statute.* Budi was legally in the country with full and valid documents of employment by the first plaintiff. Therefore, it begs the question how the first defendant could have deduced that Budi a person who had been trafficked into the country and thus be an offence for which the powers of arrest under s 29 of Act 670 or s 23 of the Criminal Procedure Code can be exercised. The complaint of alleged assault was made by Budi was against the second plaintiff, and that too is a non-seizable offence. *We find that no reasonable complaint has been made or credible information has been received or a reasonable suspicion exists for the first plaintiff to be arrested and detained in respect of a seizable offence*. (Emphasis added.)

[84] Therefore, the second defendant ought to investigate and to objectively analyse the facts to make a proper and valid judgment that it was necessary to arrest and detained the plaintiff. No investigation was done at all until three days later!!

[85] The defendants, on the other hand, submitted that the second defendant had reasonable suspicion against the plaintiff as testified during trial (see NOP, pp 45–46):

> FC: Ya, yang kuning tu. Saya rujuk Korporal kepada laporan di mukasurat 56 itu, di perenggan pertama selepas OPS Rentap tu, Korporal ada nyatakan 46 lelaki india dalam keadaan mencurigakan. Bolehkah Korporal terangkan kepada Mahkamah apakah yang Korporal maksudkan dalam keadaan mencurigakan.
>
> SD1: Mohon izin YA, sewaktu melakukan rondaan OPS Rentap khas KPD di kawasan rondaan bertarikh tersebut, *kawasan tersebut adalah kawasan 5 paling aktiviti penagihan dadah dan saya jumpa Plaintif di bawah pokok dalam keadaan gelap.* Jadi saya bersama saksi polis buat pemeriksaan lah. (Emphasis added.)

[86] Despite the fact that the plaintiff had told him about the reports of mistaken identity in his phone, the second defendant had nevertheless arrested the plaintiff without any investigation as he claimed that he had been instructed by his superior, the first defendant to bring the plaintiff to IPD Dang Wangi (see NOP, p 59).

[87] Since the first defendant had not even conducted any investigation during the initial 24 hours, the next issue to be dealt with is whether the remand order ('remand order') by the magistrate was lawful. The plaintiff premised that the first defendant's application for remand as well as the remand order itself was consequently wrongful and unlawful.

[88] I am mindful of the caution given by His Lordship Abdul Wahab Patail J (as he then was) in *Dasthigeer B Mohamed Ismail v Kerajaan Malaysia & Anor* [1999] MLJU 121; [1999] 6 CLJ 317 at p 325 that:

> the courts should apply s 117 strictly and exercising its discretion to order remand by balancing the demands of convenience of the investigative and prosecution authorities, against the fact that any remand order is a restriction of a fundamental liberty against a person who has not been convicted of an offence.

[89] His Lordship further held (at p 326 (CLJ)):

> Consideration for the reasons for authorising remand cannot be divorced from the question of the purpose of remand envisaged under s 117. Section 117 *empowers the magistrate to make orders for further remand for the purpose of completing investigations, and not for the purpose of commencing investigations* .... (Emphasis added.)

[90] The plaintiff has thus established that the defendants have breached their statutory duties. It is apt to note that the plaintiff's claim is also heavily premised on the law of tort, particularly, negligence in the context of unlawful detention by police officers including the failure of the officer to exercise the level of care and diligence required by law when arresting and detaining an individual. Herein are the summary of my findings discussed above in concluding that the plaintiff has established their case under negligence and breach of common law duty of care:

(a) duty of care:

> Police officers have a duty of care to ensure that their actions are in accordance with the law and respect the rights of individuals. This is undeniably the duties vested upon the defendants as the law enforcement officials which includes properly identifying suspects, following proper procedures for arrest and detention, and upholding the individual's rights, including the right to due process (see ss 117 and 119 of the CPC);

(b) breach of duty:

Negligence occurs when a police officer breaches this duty of care by failing to follow established procedures or by acting recklessly or carelessly. The first defendant had breached his duties when he failed to initiated an investigation within 24 hours after the second arrest and detention. Not only that, the second defendant' act of failing to inform the plaintiff of his rights to contact his family and engaged a lawyer also amounted to breach of duty of care. Corroborated evidence showed that the second defendant had failed to investigate or at least verify the plaintiff's explanation or defence of mistaken identity, leading to the wrongful detention of an innocent person. Similarly, the negligence of the first defendant in keying the name of the plaintiff into the wanted list recklessly is an obvious case of beach of duties;

(c) causation:

To establish negligence in unlawful detention, it must be shown that the officer's breach of duty was a direct cause of the wrongful detention. In our present case, the second arrest and detention would not have occurred but for the first defendant's negligent for his inaction of leaving the plaintiff's name in the PDRM Database when he knew that the plaintiff was not Shukri Rao and was not in any way connected to the offences. Likewise, the plaintiff would not be detained for three days if the first and second defendants had diligently exercised their duties and responsibilities; and

(d) harm and damages:

The plaintiff had demonstrated that he suffered harm or damages as a result of the first arrest and detention and second arrest and detention. The plaintiff's counsel submitted that his client was put into a considerable trouble and inconvenience as he suffered loss and damage, right of equality before the law, as well as deprived the right to freedom of movement and right to earn a living. The plaintiff also claimed that he has suffered humiliation, anxiety and mental anguish including fear of being arrested and detained by the police.

Breach of natural justice and CPC provisions

Breach of s 117read with s 119 of CPC

[91] The plaintiff argued that the first defendant had no grounds to believe that the accusation or information against the plaintiff was well founded and in the circumstances, he had no basis to seek remand of the plaintiff pursuant to s 117 of the CPC. The reasons underlaid by the plaintiff are:

(a) from the time of the plaintiff's second arrest and detention until the plaintiff was brought before the magistrate for remand, the first

defendant had not commenced any investigation and so, he would have formed no opinion, belief or ground as to whether the accusation or information against the plaintiff was well founded; and

(b) the first defendant testified during trial that he cancelled the RJ10A Notice on the night of the plaintiff's second arrest and detention without even verifying that the particulars of the arrested person were the right ones. He also candidly confirmed that he did not speak to the arresting officer, the second defendant about the plaintiff's second arrest and detention and so, he would not know himself the grounds in believing that the information against the plaintiff is well-founded (see NOP, p 82).

[92] The plaintiff's testimony that the remand order was improperly obtained was not challenged by the defendants. There was no evidence led by the defendants to rebut this. Neither remand minutes nor the first defendant application for remand was ever produced before this court. The application must be in the first defendant's custody and possession since he was after all the maker of the document. This court is of the view that to establish the 'reasonable believe', the first defendant should at least show or tender the investigation diary to ascertain whether there were indeed good grounds for believing the accusation or information against the plaintiff and that the remand was necessary so as to conduct further investigation. But he had failed to do so.

[93] Even assuming for a moment that the first defendant had ground to believe that the accusation or information against the plaintiff is well founded as claimed by the defendants, the evidence adduced during trial clearly indicated that the first defendant could not have produced his investigation diary to the magistrate during the remand proceedings. If he indeed did that, the said magistrate must have been wilfully and knowingly misled by the first defendant to grant the remand order. This is due to the fact that s 117 read together with s 119 of the CPC makes it mandatory for the police officer making the investigation to transmit to the magistrate a copy of the entries in the diary as prescribed under s 119 of the CPC when producing a suspect before the magistrate (see *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477; [1997] 4 AMR 3584).

[94] Section 119 of the CPC stipulates the particulars which must be noted day by day in the diary including the time at which the first defendant began his investigation and a statement of the circumstances ascertained through his investigation. Yet, the first defendant had testified that he did not initiate any investigation in the first 24 hours before taking the plaintiff for remand. Hence, there could be no particular in the diary to justify any remand to begin with.

[95] Moreover, as per the first defendant's testimony during trial, the Chow Kit Report had been fully investigated in 2017 itself leading to Shukri Rao being charged in court sometime in 2017 (see NOP, 89).

[96] The question then begets, if the investigation into the Chow Kit Report had been completed in 2017, what was there to investigate further in 2019, and for the plaintiff's second arrest and detention. What 'further investigation' was there for the first defendant to conduct?

[97] In other words, the plaintiff is challenging whether the 'wanted' status of the plaintiff is valid, given that Shukri Rao was previously charged.

[98] Regarding this, it is the defendants' case that Shukri Rao was indeed previously charged. However, the reason why the plaintiff's name still appeared as 'wanted' under the identification number used by Shukri Rao in the PDRM Database is because the latter was only released and not acquitted (discharged not amounting to an acquittal) ('DNAA') by the court in the previous case upon the prosecution's request.

[99] This court is aware that in such situation, the deputy public prosecutor can still issue further instructions to the investigating officer for further investigation and subsequently reissue charges against the suspect. (see ss 254 and 173 of the CPC). This principle can be gleaned from the case of *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723 where Nordin Hassan JCA (as he then was) held:

> [18] ... Where the prosecution has instituted against an accused on a charge, *the decision whether or not to prosecute further the accused on the charge is one for the prosecution to make*. Once he has made the decision not to prosecute the accused further, he ought in conformity to that section to inform the court of his decision and s 184(1) comes into operation. For the purpose of s 184(2) he ought further to inform the court of all relevant matters, for example, as in this case, the difficulty of tracing a material witness and his intention as to the likelihood of future prosecution of the accused on the charge. *It is then for the court to decide whether it should direct that the discharge shall amount to an acquittal. The court is vested with the discretion is, in my opinion, unfettered; but, of course, it must be exercised judicially, taking into consideration all the relevant facts and factors placed before it, including the intention of the public prosecutor as to the future prosecution of the accused on the charge.* That, in substance, is how the section operates. (Emphasis added.)

[100] Therefore, Shukri Rao could still be listed in the 'wanted' system for recharging and this does not constitute double jeopardy because the first charge was only DNAA and not acquitted and discharged ('AND'). The suspect named Shukri Rao can be charged again at any time after a complete investigation.

[101] However, in this case, unfortunately, it was the plaintiff's name which was entered into the system instead of the name of Shukri Rao. This has deprived the plaintiff's liberty as a freeman and tarnished his reputation within the ambit of the society.

[102] In fact, the first defendant testified vaguely during cross-examination that the 3 days remand was applied to further investigate 'wanted offence'. However, he has failed to answer most of the cross-examination questions put to him regarding this (see NOP, pp 135–136).

[103] In *Re: Syed Mohammad b Syed Isa; Mohd Rosdi bin Jaafar; Thiagarajah a/l Palaniandy; Rajis a/l Seeni Deen & Ors* [2001] MLJU 163; [2001] 3 AMR 3769, Abdul Wahab Patail J (as he then was) had this to say at p 3778 (AMR):

> It is necessary to understand clearly the purpose of a remand in order to be able to balance fairly between the right of personal liberty and the public interest that offenders be apprehended and brought to justice, it was held in *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116 [262E-right] that the purpose of the application for remand is to enable the police to complete the investigation. *Stating in an application that the remand applied for is to enable the police to complete investigations is not sufficient. This purpose for the application is often confused with, but is quite distinct from, the reasons or grounds to support the application for remand in order to serve that purpose.* (Emphasis added.)

[104] Applying the above principle to our case herein, the mere reason of 'for further investigation' is not sufficient to justify the remand order. What it appears to me is an obvious case of lackadaisical attitude.

[105] The plaintiff premised, and I agree, that no magistrate, having the right information that the first defendant had not commenced any investigation in the first 24 hours coupled with the fact that the investigation into the Chow Kit Report had already completed in 2017 and there was no issue of either the plaintiff absconding or interfering with the investigation, would have granted the three days remand order pursuant to s 117 of the CPC.

[106] With regard to the investigating officer's duties when applying for remand, I refer to the Court of Appeal case in *Mohd Hady bin Ya'Akop v Hassan bin Marsom & Ors* [2016] 4 MLJ 141, where Varghese George JCA held that:

> [36] What could be drawn from the above discussion was that a police officer applying for a remand (detention order for further investigation) had a duty to satisfy the magistrate that there were grounds for believing based on credible information that the person arrested was involved in a criminal offence and such investigation could not be completed within twenty four hours; the accusations must be well-founded. What this meant in other words, was that it was the responsibility of such police officer to produce to the magistrate sufficient material

A that *would pass an objective test* to show at least the existence of a reasonable basis for the alleged suspicion to justify the remand order to be issued by the magistrate. *The entries in the police diaries that had to be produced when applying for the remand order or extension should also advert to the stage and developments in the investigation under way to support the sufficient cause* upon which the magistrate would thereupon have
B to make the far reaching decision to deny one's liberty for that limited period.

...

[42] Although we might not go so far as to say that the police had wilfully deceived the magistrate or obtained those orders on a 'lie' (as argued by counsel), it was nevertheless abundantly clear that there was dereliction of duty and obligations
C bordering on gross irresponsibility on the part of the third and fourth respondents as police officers when applying for those remand orders from the magistrate. It could not be gainsaid that the first remand order was obtained by the police from the magistrate without having adduced to the court through the arresting officer (or at the least being able to identify the arresting officer) relevant material to ground
D reasonable suspicion or other sound basis to detain the appellant. In so far as the extension order was concerned, what was beyond any dispute from the record, was that there was here suppression of a material development in the investigations at that stage, namely that the appellant's story that he was not at the scene of the fight had by then been verified and confirmed by the police; there was therefore no basis for any further detention of the appellant. (Emphasis added.)

E

[107] Hence, it was the responsibility of the first defendant as the IO to produce to the magistrate sufficient material to show his reasonable basis to justify the remand order.

F

[108] For the fear of repeating, it was openly testified by the first defendant that he had not commenced any investigation within the first 24 hours. He also did not meet the plaintiff before taking him to the magistrate for remand. He did not check the Chow Kit IP to verify whether the plaintiff was the right
G suspect in the Chow Kit Report. Most alarming of all was the fact that the plaintiff was not permitted to seek legal representation and consultation either before, during or after the remand proceeding, a fact which was not challenged by the defendants during trial. Numerous breaches of duties and statutory duties have clearly been committed here.

H

[109] More intrudingly, the plaintiff further revealed that the first defendant had utilised two different judicial detention processes concurrently to keep the plaintiff detained in the police custody for three days. The evidence elicited from the first defendant during cross-examination demonstrated that
I sometime after the first defendant had obtained the remand order from the first magistrate, the first defendant proceeded to obtain from a different magistrate, a *Waran Menahan* (p 33 of encl 55) for the plaintiff, Thayanantha Rao a/l Bala Krishna be imprisoned until 13 May 2019 (see NOP, p 151):

JR: Siapa yang pohon waran ini?

SD2: Saya yang pohon.

JR: Mana nama Sarjan di sana.

SD2: Tidak tertera dalam.

JR: Jadi, macam mana kita boleh tahu?

SD2: Melalui permohonan reman.

JR: Sarjan, anda tahu tak apa waran menahan?

SD2: Tahu.

JR: Tahu. Apa dia?

SD2: Untuk menahan reman seseorang mereka atas kesalahan yang dilakukan.

JR: Apakah kandungan waran tersebut?

SD2: Tempoh hari untuk ditahan.

[110] The plaintiff's counsel questioned and challenged the motive and the need in doing so. This clearly was a complete abuse of power and mala fide action on the part of the first defendant. It is to be noted that mala fide does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, ie for a purpose other than the purpose for which it is professed to have been exercised (See *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468).

[111] The plaintiff asserted that the first defendant's conduct and action, that is to misled the magistrate hearing the remand application to grant remand order and then to go to another magistrate (on the same day) to obtain *Waran Menahan* were both devious and underhanded. The first defendant had so conducted himself even though the facts in this case shows that he knew that the police investigation into the Chow Kit Report against Shukri Rao was completed in 2017 and, according to his own testimony during trial, all that was left for him to do, as far as the Chow Kit IP is concerned, was to charge the suspect.

[112] The plaintiff premised that there was no purpose for the plaintiff to be remanded and detained under a *Waran Menahan* for three days, if the only purpose was to charge him in court on Monday. Was there a valid and reasonable cause to fear that the plaintiff would abscond if he was released and that he would not attend the court on Monday for him to be charged? If so, what was this fear based on? This has never been answered by the first defendant. After all, the first defendant testified that Shukri Rao did not abscond during court proceedings in 2017 and it was the magistrate court that issued the discharge not amounting to acquittal (DNAA) of Shukri Rao (see NOP, p 131).

[113] In *Dasthigee*, Hid Lordship Abdul Wahab Patail J at p 328 of the case, had clearly articulated that if attendance in court to be charged is the only consideration, then in the absence of any reasonable belief that he might abscond, the person could be released on police bail under s 29 of the CPC.

[114] Hence, it is my view that unless there were good and valid grounds for the first defendant to believe that the plaintiff must be kept in police detention as he would otherwise interfere with police investigation or alternatively that he might abscond, there were simply no plausible grounds for the plaintiff to be kept in the police lockup for three days and for a remand order and (more so) for a *Waran Menahan* to be taken and issued against the plaintiff.

[115] As alluded by the judgment in *Dasthigeer*, s29 of the CPC could have been utilised to release the suspect on police bail, with or without conditions/guarantors, to make certain that the plaintiff be present in court on Monday. Yet, this was not done by the first defendant.

[116] The first defendant undeniably had the power to release the plaintiff on police bail if the investigation were still ongoing and if it was necessary under all circumstances of the case, but he chose not to. I am therefore in full agreement with the plaintiff that this was an abuse of power which leads to the infringement of the plaintiff's right to liberty.

Breach of natural justice

[117] According to the plaintiff's counsel, his client was denied the right to be heard, to explain to the magistrate that this was a case of mistaken identity and that he was not involved in any offence stated in the Chow Kit Report (see PWS1, p 7). The plaintiff's testimony that he was denied the opportunity to speak during the remand proceedings was never challenged in the cross-examination. Hence, the plaintiff submitted that this tantamount to an acceptance of the witness's testimony.

Breach of s 29 and/or s 388(2) of the CPC

[118] It is undisputed that the plaintiff was released and maintained under police bail from 13 May 2019 until the time of my decision since the police bail has never been revoked. It has been four years since then. It is the plaintiff's case that the first and third defendant had no basis in law to release and keep the plaintiff on police bail as there were no sufficient grounds for further inquiry or investigation.

[119] The first defendant had on 13 May 2019 checked the Chow Kit IP and therefore he would have known that the plaintiff was not the right suspect

since Shukri Rao's photograph (taken in 2017) would be in the said Chow Kit IP (see NOP, p 127):

> JR: Dan selepas itulah, anda telah mendapat arahan selepas anda melaporkan kepada pegawai atasan untuk lepaskan beliau atau jaminan polis?
>
> SD2: Setuju.
>
> JR: Dan dalam kes ini, Sarjan, selama kita berbalik kepada isu reman nanti ya. Bilakah anda telah mendapat kertas siasatan 2017 kembali ke tangan anda?
>
> SD2: Hari 13 haribulan.
>
> JR: Jadi setuju sekiranya kertas siasatan itu diperolehi serta merta tak perlu kita memasuki proses reman sampai kita sampai ke perkarangan bilik Mahkamah, setuju?
>
> SD2: Macam, ulang semula.
>
> JR: Sekiranya anda telah mendapatkan kertas siasatan secepat mungkin pada hari yang sama atau sekurang-kurangnya selang sehari, kita tak mungkin akan berada di mahkamah hari ini.
>
> SD2: Setuju.
>
> *JR: Kerana tentu anda akan sedar dan pasti sedar orang yang ada di hadapan anda bukanlah suspek mengikut siasatan anda pada tahun 2017, setuju?*
>
> SD2: Setuju. (Emphasis added.)

[120] Beside the documents showing the issue of mistaken identity, during trial, the first defendant had testified that he also went to the National Registration Department on 13 May 2019 to verify the plaintiff's fingerprints against the JPN's record where he was told by JPN that 'tiada rekod dijumpai' (aee p 60 of B1). Hence, what was the rationale for releasing the plaintiff on police bail when he already knew with 100% certainty that the plaintiff was not the suspect for the Chow Kit Report?

[121] Even more alarming (again) is the fact that the first defendant, in his testimony during cross-examination (see NOP, pp 141–143), had testified that after he found out himself that the plaintiff was not Shukri Rao on 13 May 2019, he updated his superior, the third defendant, on the facts of the case and for the plaintiff to be released on police bail. The third defendant had in turn informed the fourth defendant, who in turn approved the same. (see NOP, pp 141–143).

[122] Despite knowing that the plaintiff was not involved in the Chow Kit Report and that the plaintiff had been wrongly arrested, the defendants, for unknown reasons took extraordinary and gratuitous action to release the plaintiff on bail which continued until this decision.

[123] With respect, this xourt is of the view that the first defendant's act to hide behind his uniform to say 'my superiors told me' or 'I was acting under orders' is not acceptable, for a police officer must be accountable for his actions. If at all the defendants are serious about this, they must call this/these superior(s) who had given that order to testify and explain during this trial. This xourt and the public deserve to know the logical reason from such superior(s) for such illogical order.

[124] Besides, I also take note of the first defendant's attitude and demeanour when answering questions which demonstrated high handedness as well as his arrogance and disregard of the plaintiff's rights as the detainee. It is most unfortunate that such mindset of the police still exists in the new millennium!

[125] In defence, the defendants have sought to argue that they have not breached the plaintiff's constitutional rights and submitted that the plaintiff had failed to challenge his detention in any High Court or appeal against the decision of the magistrate in relation to the remand order.

[126] The second defendant testified that he made a telephone call to conduct a criminal record check with the Dang Wangi IPD Control Center. The results of the check revealed that the plaintiff's identification number had eight previous records. The plaintiff also has one outstanding record related to the Chow Kit Report 5332/17 for a drug-related offense. The defendants argued that the mere existence of the report itself is sufficient evidence that the requirements for detention have been met.

[127] The test to determine whether the arrest was reasonable depends on whether the defendants at that time had reliable information and reasonable suspicion to cause the arrest. Therefore, the defendants alleged that the arrest made against the first defendant in this case is lawful under the provisions of s 23(1) of the CPC, as the conditions for a valid arrest, including having reliable information and reasonable suspicion, have been met.

[128] Regarding the issue of the plaintiff's identity, it is argued that, based on the information report obtained by the second defendant during the arrest, no photograph was provided to the second defendant. The arrest was made through a telephone call, and the second defendant has clarified that his duty was only based on the information received. It is the responsibility of the investigating officer to ensure that the person detained is the actual wanted individual or not.

[129] Further, the defendants also argued that the police officers who are executing a remand order or warrant issued by a magistrate are provided with

protection from civil action while carrying out investigations against the plaintiff. This protection is specified under sub-s 32(1) of the Police Act 1967.

[130] The plaintiff refuted this by referring to the recent case of *Rahaya bt Salleh (administratrix for the estate and dependant of Kamarulnizam bin Ismail, deceased) v Nik Mohd Ghazali B Nik Zul Azhar & Ors and another appeal* [2022] 5 MLJ 337; [2022] 5 MLRA 280. Ahmad Nasfy JCA has succinctly held that:

> [44] ... *In Malaysia, neither the police nor the prison authorities enjoy immunity from a civil claim for negligence*. So too the personnel in the discharge of their duties. Cases on this point are aplenty and there is no necessity for us to state them. It is plain as pikestaff or as night follows day. (Emphasis added.)

[131] Thus, the defendants could not conveniently shield their wrongdoings under the Police Act 1967. As public officers, they must be accountable for all their wrongful acts, deeds and negligence and compensate their tortious victims who have suffered losses accordingly.

Misfeasance in Public Office

[132] The defendants submitted that the plaintiff had failed to specifically plead the particulars of the alleged misfeasance in public office and also what were the first and second defendants' acts of mala fide. The defendants further submitted that the plaintiff failed to plead and prove the damage and loss suffered.

[133] In response, the plaintiff asserted that the plaintiff's statement of claim has laid out, with sufficient particularity the details of misfeasance in public office as well as the loss and damage suffered by the plaintiff.

[134] In *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1, the Apex Court had instructively considered the development of the tort of misfeasance in public office:

> [76] The development of misfeasance in public office and its role in the general scheme of tort law was considered by the House of Lords in the leading case of *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1. The tort is founded on the unifying element of abuse of public power in bad faith (at 191–192). Lord Steyn explained the rationale of the tort (at 190, 192):
>
> > 'The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes: *Jones v Swansea City Council* [1990] 1 WLR 54, 85F, per Nourse LJ ... The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to

him and that it is likely to cause damage to an individual or individuals.'

[135] As to the issue of what is 'public office', Nallini Pathmanathan FCJ in *Tony Pua* quoted as follows:

> [80] It is only in view of the rationale and basis of the tort of misfeasance that the proper scope of 'public officer' can be determined. The classic description of 'public officer' in the context of misfeasance is the passage of Best CJ in the early case of *Henly v Lyme Corporation* (1828) 5 Bing 91 (at 107-8, quoted with approval by the High Court of Australia in *Northern Territory of Australia v Mengel* (1995) 129 ALR 1):
>
> > *Then, what constitutes a public officer? In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer.* (Emphasis added.)

[136] The first to sixth defendants were all police officers, holding public office and were employed by the seventh defendant. Hence, the plaintiff submitted that the first to sixth defendants fall under the definition of 'public officer' and the fact that they were exercising their powers for a public purpose is undisputable.

[137] The issue that falls to be determined by this Court then, as stated by the High Court in *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor* [2020] 7 MLJ 549 is whether each of the defendants had the state of mind to harm the plaintiff, that is to say, either targeted malice specifically intended to injure the plaintiff or knowledge by the public officer that he has no power to carry the act complained of and that the act will injure the plaintiff bad faith arises in because the officer does not have honest belied that his act is lawful.

[138] The plaintiff relied heavily on the judgment in *Abdul Ghani Haroon* where the applicants were arrested under s 73 of the Internal Security Act 1960. The applicants' detention was extended twice and the police had denied family members, lawyers and members of SUHAKAM access to the applicants after which, a writ of habeas corpus was filed. The court had to consider whether the applicants were unlawfully detained and in deciding that the detention was unlawful, Mohd Hishamuddin J (as he then was) stated, inter alia:

(a) the detention was mala fide by reason of deliberate and unreasonable denial of access to family members; and

(b) the detention was mala fide by reason of deliberately and unreasonably denying access to lawyers by the respondent. 'Such denial was not only cruel, inhuman and oppressive, it is also a blatant violation of the

applicant's constitutional rights under art 5(3) of the Constitution' (see p 704 para F, p 706 para B).

[139] To hark back to the facts in our case herein, the plaintiff claimed that his right to notify his family and to seek legal representation after his arrest and before the remand order had been granted was denied. Furthermore, the first, second and fourth defendant had full knowledge that the plaintiff was not the correct suspect in the Chow Kit Report, yet they failed to unconditionally release the plaintiff on 13 May 2019 and had released and kept the plaintiff on police bail instead, for the past four years.

[140] The first to sixth defendants were empowered by the position that they held to arrest and keep in detention the plaintiff and the exercise of such power should not have been exercised in excess and/or disregarded altogether. The plaintiff submitted that the first to sixth defendants had abhorrently and egregiously violated legal safeguards in the exercise of their public duties for they had misuse their powers for a different purpose, at all material times, conscious that in doing so, the plaintiff could be injured/harmed. The plaintiff's first arrest and detention and second arrest and detention could have been avoided altogether if only the defendants had properly and diligently carried out their public duties.

[141] This was unequivocally admitted by SP1, who presently holds the position of Ketua Urusetia Ketua Polis Negara Perundangan Polis Bukit Aman. In fact after the filing of this Action and before the commencement of the trial, and after years of writing to seek action by the Police to clear his good name, it was SP1 who stepped in and replied to the plaintiff's counsel in 2021 admitting and acknowledging that indeed the plaintiff's IC number has been exploited by Shukri Rao. Together with this frank disclosure, SP1 also stated in the letter that the Police had since deleted the criminal record of Shukri Rao in the PDRM Database, and ratified the details of numerous police reports (encl 55, pp 100–101).

[142] During trial, SP1 was candid to testify that if steps had been taken at the material time in 2017 to correct the errors in PDRM Database, the plaintiff would not have to endure the second arrest and detention (see NOP, pp 40–41):

> JR: Tuan Rahman, kita tahu dokumen-dokumen ini menyokong surat Tuan bertarikh 12.1.2021 bahawa ada identiti salah. Soalan terakhir saya — as a very senior ranking police officer, *adakah kenyataan saya betul sekiranya isu ini diperbetulkan pada tahun 2017, anakguam saya tidak akan mengharungi tangkapan pada 2019?*
>
> SP1: *YA, saya harus bersetuju dengan pihak Plaintif.* Saya ada buat pertanyaan tentang rekod daripada D2 dan D4 mengesahkan bahawa inilah sahaja rekod yang

masih tinggal dengan mereka. As far as cap jari, tak ada apa langsung. As far as D4, hanya yang dicatitkan berkenaan Plaintif sahaja, yang lain telah dipadam.

JR: Soalan saya sekali lagi Tuan-if these has been rectified in 2017, we would not be in Court today?

SP1: YA, saya setuju. (Emphasis added.)

[143] To sum up, it is clear that the plaintiff has also established on the balance of probabilities that the tort of misfeasance in public office has also been committed by the defendants through their handling of this case which has caused the unfortunate suffering of the plaintiff.

CONCLUSION

[144] Based on the above, I find that the plaintiff has shown that the defendants have committed numerous tortious wrongs against the plaintiff and that the defendants' conduct especially those of the first defendant, has deprived the plaintiff his constitutional right. However, in view that, during the trial, the defendants have ratified the mistake in the PDRM Database and the plaintiff and his identity card number is no longer mistaken for and/or associated with Shukri Rao, I do not see any need for the injunction sought. Hence, this court allow the plaintiff's claim with cost and, as per the prayers, order the following:

(a) a declaration that remand order dated 11 May 2019 was wrongfully obtained by the defendants without sufficient cause;

(b) a declaration that the police bail granted on 13 May 2019 to the plaintiff was unlawful;

(c) a declaration that the plaintiff's constitutional rights were infringed; and

(d) global damages of RM250,000.

Claim allowed.

Reported by Muhamad Azham Marwan